NO. 02-0427

In the Supreme Court of Texas

WEST ORANGE-COVE CONSOLIDATED I.S.D., ET AL.,

Petitioners,

v.

FELIPE ALANIS, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF EDUCATION, ET AL.,

Respondents.

PETITION FOR REVIEW

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II. Defendants/Appellees/Respondents:

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Abbreviations

• West Orange-Cove Consolidated I.S.D., Coppell I.S.D., La Porte I.S.D., and Port Neches-Groves I.S.D.	"Petitioners"
• Felipe Alanis in his official capacity as the Commissioner of Education, the Texas Education Agency, Carol Keeton Rylander in her official capacity as Texas Comptroller of Public Accounts, and the Texas State Board of Education	"State Respondents"
• Alvarado I.S.D., Anthony I.S.D., Aubrey I.S.D., Bangs I.S.D., Bells I.S.D., Community I.S.D., Cooper I.S.D., Covington I.S.D., Detroit I.S.D., Early I.S.D., Fannindel I.S.D., Hutto I.S.D., Karnes City I.S.D., Kaufman I.S.D., Kirbyville I.S.D., Krum I.S.D., La Joya I.S.D., Mercedes I.S.D., Meridian I.S.D., New Boston I.S.D., Nocona I.S.D., Olfen I.S.D., Orange Grove I.S.D., Poteet I.S.D., Robinson I.S.D., Rosebud-Lott I.S.D., Rusk I.S.D., Southside I.S.D., Tornillo I.S.D., Trenton I.S.D., Tulia I.S.D., Uvalde I.S.D., Venus I.S.D., and Weatherford I.S.D.	"Alvarado Respondents"
• Edgewood I.S.D., Ysleta I.S.D., Laredo I.S.D, San Elizario I.S.D., Socorro I.S.D., and South San Antonio I.S.D.	"Edgewood Respondents"

Record references

Petitioners will cite to the record as follows:

- Clerk's record: "CR (page)";
- Reporter's record: "RR (page)";
- References to the attached Appendix: "Tab (letter) at (page)".

STATEMENT OF THE CASE

Nature of the case:	Petitioners sued State Respondents seeking a declaration that the $1.50 cap on a school district's tax rate for "maintenance and operations" (Texas Education Code § 45.003(d)) imposes a state ad valorem tax in violation of article VIII, section 1-e of the Texas Constitution because of the districts' lack of meaningful discretion in setting tax rates.
Trial court:	The Honorable Scott McCown, 345th Judicial District Court, Travis County.
Disposition in trial court:	The trial court dismissed Petitioners' lawsuit at the pleading stage. Based upon the pleadings, the court determined that "only" 12% of the districts were taxing at the $1.50 cap and held that, "[f]or the legislative design to be an unconstitutional state ad valorem tax, the design must require a significant number of districts to tax at the cap, something approaching or exceeding half the districts." (CR 245.) (Tab B.)
Parties in court of appeals:	All parties in the trial court were parties to the appeal. While the case was on appeal, Felipe Alanis, the current Commissioner of Education, was substituted for Jim Nelson, the former Commissioner of Education, pursuant to Rule 7.2(a) of the Texas Rules of Appellate Procedure.
Court of Appeals opinion:	*West-Orange Cove Consol. Indep. Sch. Dist. et al. v. Alanis et al.*, No. 03-01-00491-CV, 2002 WL 534582, (Tex. App.—Austin April 11, 2002, pet. filed) (opinion by Justice Smith, joined by Chief Justice Aboussie and Justice Puryear) (Tab A.)

Disposition in Court of Appeals: The court of appeals affirmed the trial court's dismissal of Petitioners' lawsuit, but on a different ground. The court rejected the "numbers" approach advanced by the trial court and held that the issue was whether a single district had been forced to "tax at the highest allowable rate to provide the bare, accredited education." (Tab A at 15.) The court of appeals dismissed on the ground that Petitioners had not pled that they were required to "tax at the highest allowable rate to provide the bare, accredited education," without allowing Petitioners an opportunity to re-plead or present evidence, even though the trial court had assumed the sufficiency of Petitioners' pleadings on this ground. (From the trial court opinion: "Naturally, the court has assumed on special exceptions that if a district is at the cap, the district must be at the cap." CR 244; Tab B.)

STATEMENT OF JURISDICTION

The Texas Supreme Court has jurisdiction of this appeal pursuant to section 22.001(a)(6) of the Texas Government Code. This case presents important issues regarding the constitutionality of Texas' public school finance system, the resolution of which impacts every student, school district and property taxpayer in the state. In particular, this appeal raises the question of whether Petitioners have stated a ripe claim under this Court's opinion in *Edgewood IV* that Texas school districts no longer have constitutionally sufficient discretion in setting their tax rates. Despite the importance of this issue, this case was not permitted to proceed beyond the pleading stage.

ISSUES PRESENTED

Briefed Issues

1. In a case involving important and unsettled questions of constitutional law concerning the public school finance system in the State of Texas, did the court of appeals err in affirming the dismissal of Petitioners' claims at the pleading stage?

    a. Should Petitioners have been given an opportunity to amend their pleadings, conduct discovery and/or present evidence?

    b. Were Petitioners required to plead that they were "forced to tax at the highest allowable rate to provide the bare, accredited education" when that standard is not contained in the Texas Constitution?

    c. Should there be a linkage between the constitutional "general diffusion of knowledge" standard and legislative accreditation standards, and if so, should it be subject to judicial oversight and/or evidentiary review based upon changed circumstances?

Unbriefed Issues

2. Was dismissal proper on the ripeness grounds that underlie the trial court's opinion?

    a. Have Petitioners stated an actual injury?

    Under the court of appeals holding, a single district that meets the pleading threshold can state a cognizable claim. Thus, the court of appeals rejected the trial court's conclusion that at least half the districts have to be taxing at the $1.50 cap in order for Petitioners to state a claim and did not reach the issues of whether the trial court should have included in its calculation (1) the districts taxing near the cap (which would now bring the percentage of injured districts to 30%), and (2) districts that had granted constitutionally-authorized optional homestead exemptions (which would now bring the percentage of injured districts to 41%). The following issues are presented in the event that the Court finds that the court of appeals' opinion is not dispositive:

        i. Must a certain percentage of school districts in the State be taxing at or near the $1.50 "maintenance and operations" cap (the "$1.50 cap") before Petitioners can proceed with their claim that the $1.50 cap results in an unconstitutional state ad valorem tax?

ii. How much taxing discretion must a district have in order to have "meaningful discretion" within the meaning of *Edgewood III* and *Edgewood IV*? For example, does a district have to be taxing exactly at the $1.50 cap without providing an optional homestead exemption before it lacks "meaningful discretion" within the meaning of *Edgewood III* and *Edgewood IV*?

b. Have Petitioners stated an injury that is sufficiently likely to occur?

PRELIMINARY STATEMENT

Despite the serious and unsettled constitutional issues raised by this lawsuit concerning Texas' public school finance system, the Petitioner school districts' claims were dismissed with prejudice without the allowance of an opportunity to re-plead and before discovery was undertaken or evidence presented. The trial court dismissed based upon its finding that Petitioners did not state a ripe claim because "only" 12% of the districts were taxing at the statutory cap. The court of appeals did not adopt this argument and acknowledged that a claim could be stated if even a single district is forced to tax at the cap. The court of appeals instead dismissed on the ground that no district had alleged or could allege that it was taxing at the cap in order to satisfy legislated accreditation standards. The standard imposed by the court of appeals is questionable at best; in any event, as recognized by this Court and the trial court, the touchstone of the court of appeal's opinion requires resolution by the evidence and not by a pleading technicality. Petitioners have been improperly denied their day in court.

STATEMENT OF FACTS

A. The Court has considered prior challenges to the school finance system.

The Texas Supreme Court has considered challenges to the constitutionality of Texas' public school finance system on four occasions over the past thirteen years. *See Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (*Edgewood I*); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991) (*Edgewood II*); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d

489 (Tex. 1992) (*Edgewood III*); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995) (*Edgewood IV*).

In the last two challenges, the Court considered claims that the finance system relied on state ad valorem taxes in violation of article VIII, section 1-e, of the Texas Constitution.[1] (Tab D.) In *Edgewood III*, the Court held that a previous incarnation of the finance system violated this constitutional provision because the State had set the tax rates of the local taxing entities by statute.[2] *See Edgewood III*, 826 S.W.2d at 500. The Court found that "[a]n ad valorem tax is a state tax . . . when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion." *Id.* at 502.

In response to the Court's ruling, the Legislature in 1993 passed Senate Bill 7, which instituted the basic architecture of the current school finance system. The mechanics of the current system are accurately described in the court of appeals' opinion. A key feature of the current system is its imposition of an $1.50 cap on maintenance and operations ("M&O") tax rates for all school districts (the "$1.50 cap"). *See* TEX. EDUC. CODE ANN. § 45.003(d) (Vernon Supp. 2002).

In *Edgewood IV*, Texas Supreme Court upheld the constitutionality of Senate Bill 7. *See Edgewood IV*, 917 S.W.2d at 717. (Tab C.) The Court recognized that districts'

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[1] This section provides: "No State ad valorem taxes shall be levied upon any property within this State." TEX. CONST. art. VIII, § 1-e. (Tab D.)

[2] The finance system at issue in *Edgewood III* was based on the concept of tax base consolidation, whereby all the school districts in a particular county would relinquish their authority to raise and distribute local property taxes to a single taxing entity called a County Education District. *See Edgewood III*, 826 S.W.2d at 498-99.

discretion in setting tax rates was constrained from above by the $1.50 cap (the "ceiling") and from below by their constitutional obligation to provide their students with a "general diffusion of knowledge" (the "floor").[3] But because the Court found that the districts still had sufficient and meaningful discretion in setting their local property tax rates between the floor and the ceiling, the Court concluded that Senate Bill 7 did not result in a state ad valorem tax in violation of article VIII, section 1-e of the Texas Constitution.[4] *See id.* at 737-38. However, the Court issued a warning:

> [I]f the cost of providing for a general diffusion of knowledge continues to rise, as it surely will, the minimum rate at which a district must tax will also rise. Eventually, some districts may be forced to tax at the maximum allowable rate just to provide a general diffusion of knowledge. If a cap on tax rates were to become in effect a floor as well as a ceiling, the conclusion that the Legislature had set a statewide ad valorem tax would appear to be unavoidable because the districts would then have lost all meaningful discretion in setting the tax rate.

Edgewood IV, 917 S.W.2d at 738.

B. Petitioners brought suit based upon the *Edgewood IV* warning and changed circumstances.

Claiming that the Court's warning had materialized and that the $1.50 cap had become both a floor and ceiling for many districts, Petitioners brought suit against the State Respondents in April 2001. (CR 2.) Petitioners sought a declaration that the $1.50 cap on a school district's M&O tax rate, set forth in Section 45.003(d) of the Texas

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[3] The Texas Constitution provides: "A general diffusion of knowledge being essential to the preservation of liberties and rights of the people, it shall be the duty of the Legislature to establish and make suitable for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, § 1. (Tab E.)

[4] According to the Court, at the time of *Edgewood IV*, the property-rich districts had the discretion to tax between $1.22 and $1.50 and the property-poor districts had the discretion to tax between $1.31 and $1.50. *See Edgewood IV*, 917 S.W.2d at 731.

Education Code, had resulted in the imposition of *de facto* state ad valorem taxes in violation of article VIII, section 1-e of the Texas Constitution, on the grounds that the districts no longer had meaningful discretion in setting their local property tax rates as a result of state-imposed constraints. (CR 103-11; Tab F.)

C. The trial court dismissed Petitioners' suit at the pleading stage.

The State Respondents filed a Plea to the Jurisdiction and Special Exception on May 7, 2001 ("the State Respondents' Pleading"), asserting that the trial court lacked subject-matter jurisdiction because Petitioners' claim was not ripe for adjudication. (CR 11-23.) The State Respondents argued that Petitioners could assert a ripe constitutional claim only if *all* districts in Texas were required to tax at the $1.50 cap in order to provide a general diffusion of knowledge. (CR 15.)

Two sets of school districts, the Alvarado Respondents and the Edgewood Respondents, intervened in the lawsuit and joined in the State Respondents' Pleading. (CR 94, 185.) The Alvarado Respondents also filed a special exception alleging that Petitioners had failed to state a cause of action because Petitioners "omitted that they were required to adopt a $1.50 tax rate in order to provide the constitutionally-required general diffusion of knowledge to their students."

Petitioners' First Amended Petition, which was filed before the Alvarado Respondents' special exception, (1) cited the "general diffusion of knowledge" standard urged by the Alvarado Respondents, (2) quoted the *Edgewood IV* prediction that "[e]ventually, some districts may be forced to tax at the maximum allowable rate just to provide a general diffusion of knowledge," and (3) concluded that, "[a]s predicted in

Edgewood IV, school districts, such as the Plaintiffs, are required to tax at or near the maximum allowable $1.50 M&O tax rate in order to educate students in their districts." (CR 109; Tab F)

After a hearing, the trial court dismissed Petitioners' suit without an opportunity to re-plead. The trial court's ruling was based upon its conclusion that "a single number decides this case on special exceptions – the percentage of districts that are at the cap of $1.50." (CR 245.) The trial court held that "[f]or the legislative design to be an unconstitutional state ad valorem tax, the design must require a significant number of districts to tax at the cap, something approaching or exceeding *half the districts*." (CR 245 (emphasis added).) Because the trial court ascertained that "only" 12% of the districts were taxing exactly at the $1.50 cap without providing an optional homestead exemption, the court determined that the Petitioners "cannot state a claim upon which relief can be granted because a constitutionally insignificant number of districts are at the cap of $1.50."[5] (CR 245.) The trial court assumed for the purposes of its analysis that all districts taxing at the $1.50 cap were being forced to do so in order to provide a "general diffusion of knowledge." (CR 244 (emphasis added).)[6]

[5] School districts set their 2001-02 tax rates after the trial court reached its decision, which was based on the districts' 2000-01 tax rates. Under the new count, 17% of the districts are taxing exactly at $1.50 without providing an optional homestead exemption; these districts educate 861,597 students, or 21% of Texas' student population. A broader examination of the 2001-02 data reveals that 41.3% of school districts are now taxing at or within five cents of the $1.50 cap; these districts educate 2,609,039 students, or 64.7% of Texas' student population. *See infra* note 9 and accompanying text.

[6] The trial court also dismissed "future claims" on the ground that they were not ripe for adjudication. The court noted that the tax "might become unconstitutional in the future," but that, since legislative intervention was a possibility, the court lacked jurisdiction until such time that "[t]he fruit has fallen from the tree, meaning that the tax has become unconstitutional." (CR 246-49.)

D. The court of appeals affirmed the trial court's dismissal, but on a different ground.

The court of appeals affirmed the trial court's decision, but criticized the trial court's rationale, reasoning that "the controlling factor in reviewing a challenge to an alleged ad valorem tax is the State's involvement in the levy." (Tab A at 20.) "Whether the effect of the tax is experienced '*statewide*' or by a majority of districts in the state does not determine whether a tax is a state tax." (Tab A at 20.) The court concluded that "the allegation that *a district* is forced to tax at the highest allowable rate to provide the bare, accredited education is a necessary element of a cause of action," and Petitioners' failure to plead this specific element required dismissal even though (1) Petitioners had not been given an opportunity to re-plead or produce evidence in response to this pleading threshold (judicially adopted for the first time on appeal), and (2) the trial court assumed that Petitioners had satisfied this pleading threshold and treated the inquiry as one requiring discovery and evidence. (Tab A at 15 (emphasis added); CR 244-45.)[7]

SUMMARY OF THE ARGUMENT

Faced with "changed circumstances" that this Court acknowledged in *Edgewood IV* could allow a new challenge to the public school finance system, Petitioners brought this suit. However, due to inconsistent and erroneous adverse rulings by the trial court and the court of appeals, Petitioners have yet to receive their day in court.

The court of appeals properly rejected the trial court's holding that Petitioners, in order to state a ripe claim, had to show that at least half of the districts were taxing at the

[7] Using the same rationale, the court of appeals also concluded that Petitioners' claims were not ripe.

cap. The court of appeals correctly recognized that a single district could state a ripe claim if it were subject to an unconstitutional state property tax. But the court of appeals committed error by holding that Petitioners' suit should be dismissed because Petitioners had not pled and could not plead that they were "forced to tax at the highest allowable rate to provide the bare, accredited education." This holding is both procedurally and substantively flawed. It is procedurally flawed because Petitioners were never given an opportunity to re-plead or present evidence. It is substantively flawed because it improperly assumes that (1) the linkage between the constitutional general diffusion of knowledge standard and legislative accreditation standards is irrevocable and not subject to judicial oversight; and (2) evidence of changed circumstances cannot be considered. Under *Edgewood IV*, the court of appeals opinion should be reversed and Petitioners allowed their day in court.

ARGUMENT AND AUTHORITIES

I. This case is important to jurisprudence of the State.

In *Edgewood IV*, this Court warned that "[i]f a cap on tax rates were to become in effect a floor as well as a ceiling, the conclusion that the Legislature had set a statewide ad valorem tax would appear to be unavoidable because the districts would then have lost all meaningful discretion in setting the tax rate." 917 S.W.2d at 738.

In recent years, the Court's warning has proven prophetic.[8] In the current fiscal year, 41.3% of school districts are taxing at or within five cents of the $1.50 cap.[9] These

[8] Three current Justices observed in *Edgewood IV* that it was not a mere likelihood, but a certainty, that Petitioners would suffer the injuries they now claim. *See Edgewood IV*, 917 S.W.2d at 756-57 (Enoch, J., concurring and dissenting) ("There can be no question that Senate Bill 7 requires all districts to tax at

districts educate 2,609,039 students, or 64.7% of Texas' overall student population. Twenty-four percent of the school districts are taxing exactly at the $1.50 cap. These districts educate 1,220,177 students, or 30% of Texas' student population. Districts at the $1.50 cap are unable to raise any additional revenues under the finance system to maintain valued programs, despite the demands of their constituents. Instead, these districts have been forced to cut programs, eliminate teaching positions and increase class sizes. (CR 109.)[10]

If this case is allowed to proceed to the merits, it will present for determination the issue of whether, due to the changed circumstances that currently exist, the tax structure blessed by a bare majority of the Court in *Edgewood IV* now constitutes a statewide property tax prohibited by the Texas Constitution. The court of appeals foreclosed that inquiry at the pleading stage by holding that no cognizable claim has been stated because Petitioners did not claim that taxation at the cap was required in order to meet legislated accreditation standards. The threshold issue is whether the court of appeals acted

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$1.50. . . . [A]ll of the State's evidence at trial conceded and assumed that Senate Bill 7 would force all districts to tax at $1.50 at full implementation."); *Id.* at 765 (Hecht, J., joined by Owen, J., concurring and dissenting) (noting that the aggregation of districts at the $1.50 cap is "imminent and inexorable").

[9] Petitioners will ask the Court to take judicial notice of this 2001-02 tax rate data, which was provided to Petitioners by the State Respondents. The State Respondents indicated below that they would not oppose the introduction of this data.

[10] Because this case was decided on special exceptions, Petitioners were not permitted to introduce evidence of the budgetary and program cuts they have been forced to enact. However, newspaper articles from around the state document the severity of the crunch facing school districts. *See, e.g.*, Joshua Benton, *School Tax Cap Cuts Deep*, DAL. MORN. NEWS, Aug. 26, 2001, at 1A (noting the job cuts and cuts in academic and extracurricular offerings made by Dallas-area schools); Kevin Moran, *Dickinson's Schools Plan to Cut Budget*, HOUS. CHRON., Oct. 8, 2001, at A21 (quoting superintendent of district taxing at $1.50 cap as predicting district bankruptcy within a few years unless dramatic budget cuts are imposed or tax laws are changed); Marice Richter, *Carroll Drops Some Spanish Classes, Adds Fees*, DAL. MORN. NEWS, June 6, 2002, at 29A (noting that district eliminated Spanish program for elementary and middle school students and added fees for extracurricular activities and transportation).

properly in light of the appellate court's failure to allow an opportunity to re-plead, engage in discovery, or present evidence. Beyond this threshold issue, there is the question of whether, and under what circumstances, the judiciary should provide oversight of whether the accreditation standards promulgated by the legislature satisfy the "general diffusion of knowledge" requirement set forth in the Texas Constitution.[11] This Court has consistently recognized that these issues are significant to the jurisprudence of the State.

II. Dismissal without an opportunity to re-plead, engage in discovery, or present evidence, was wrong.

Although the court of appeals affirmed the trial court's dismissal, it did not rely on the trial court's reasoning or analysis. Instead, relying upon a cross-point raised by the Alvarado Respondents, the court of appeals held that Petitioners' claims warranted dismissal based upon its conclusion that Petitioners had not pled and could not plead that they were "forced to tax at the highest allowable rate to provide the bare, accredited education."[12] (Tab A at 15.) However, as even the Alvarado Respondents recognized (Alvarado Appellees' Br. at 8), the trial court had assumed the sufficiency of the pleadings on this ground. (CR 244 ("Naturally, the court has assumed on special exceptions that, if a district is at the cap, the district must be at the cap.").)

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[11] *See Edgewood IV*, 917 S.W.2d at 730 n.8, 731 n.10.

[12] The court of appeals conflated ripeness and sufficiency of the pleadings, concluding that Petitioners' claim was not ripe because Petitioners did not meet the proper pleading threshold. (Tab A at 21.) Petitioners question whether this was proper; in any event, the arguments Petitioners make in this Petition apply equally to the court of appeals' ripeness and "failure to state a claim" analyses. Moreover, in light of the trial court's refusal to allow the parties to present evidence necessary to resolve any jurisdictional issue, the court of appeals erred in relying upon a ripeness theory. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554-55 (Tex. 2000).

Given this procedural history, the court of appeals erred by not allowing Petitioners an opportunity to re-plead and to present evidence. If the trial court had dismissed on the grounds cited by the court of appeals, the trial court would have given Petitioners an opportunity to re-plead and conduct discovery. In fact, the trial court explicitly recognized that Petitioners' lawsuit could not be dismissed at the pleading stage on the theory adopted by the court of appeals because the inquiry required the consideration of an evidentiary record, including a "forensic audit of districts' costs of education." (CR 244-45.) Even counsel for the Alvarado Respondents anticipated that Petitioners would have an opportunity to re-plead upon the granting of their special exception. (RR 34, 86.)

The court of appeals misunderstood the sequence of events. The court found that Petitioners had responded to the Alvarado Respondents' special exception, but had failed to cure by adding an "allegation that [they were] forced to tax at or near the maximum rate to provide an accredited education." (Tab A at 12.) Aside and apart from the fact that the Alvarado Respondents' special exception did not reference legislative accreditation standards, Petitioners First Amended Petition (the pleading considered at the trial court hearing) was in fact filed *before* the filing of the Alvarado Respondents' exception.

The only reason the trial court did not afford Petitioners the opportunity to re-plead and conduct discovery was that no re-pleading could cure the fact that less than 50% of the districts were taxing at the cap. (CR 224-25, 245.) The court of appeals erroneously seized upon the trial court's refusal to allow a re-pleading, which made sense

within the limited context of the trial court opinion, but which made no sense within the context of the changed holding of the appellate court. *See Friesenhahn v. Ryan*, 960 S.W.2d 656, 658-59 (Tex. 1998) (pleader should have opportunity to amend to respond to a sustained special exception); *Mestiza v. DeLeon*, 8 S.W.3d 770, 774 (Tex. App.—Corpus Christi 1999, no pet.) (reversing and remanding case after trial court dismissed on a special exception without giving plaintiff an opportunity to amend).

III. Dismissal based upon the legislative accreditation standard was wrong.

The court of appeals' opinion also erroneously assumes that the constitutional general diffusion standard is irrevocably tied to legislated accreditation standards and that there is no place for judicial oversight or consideration of evidence of developments since *Edgewood IV*. (Tab A at 16-17.) These assumptions are wrong.

A. In *Edgewood IV*, the Court affirmed the propriety of judicial oversight.

The *Edgewood IV* court itself emphasized that any linkage between the general diffusion of knowledge requirement and accreditation standards was subject to judicial review. The Court observed that

> the Legislature may [not] define what constitutes a general diffusion of knowledge so low as to avoid its obligation to make suitable provision imposed by Article VII, section 1. While the Legislature certainly has broad discretion to make the myriad policy decisions concerning education, *that discretion is not without bounds.*

917 S.W.2d at 730 n.8 (emphasis added). This statement recognizes a constitutionally-mandated minimal level of adequacy apart from the legislatively-defined level.[13]

[13] A New York court recently observed:

> it would [be] tempting to use the Regents Learning Standards to provide content for the sound basic education standards as the plaintiffs urge. The Standards' specificity would

Even assuming the Legislature is entitled to define the substantive contours of the "general diffusion of knowledge" requirement in the first instance, it is still the job of the judiciary to determine whether the legislatively-adopted guidelines comport with Texas' constitutional requirements. *See Edgewood I*, 777 S.W.2d at 394 ("By express constitutional mandate, the legislature must make 'suitable' provision for an 'efficient' system for the 'essential' purpose of a 'general diffusion of knowledge.' While these are admittedly not precise terms, they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions. . . ."); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803).[14]

B. In *Edgewood IV*, the Court acknowledged that the meaning of "general diffusion of knowledge" could change over time.

In *Edgewood IV*, this Court recognized that the "general diffusion of knowledge" standard was not static but could change over time. The Court expressly cautioned that what the Legislature today considers to be "supplementation may tomorrow become necessary to satisfy the constitutional mandate for a general diffusion of knowledge."

> probably help the court take the measure of the education provided New York City public school students, just as they help the Regents do the same. However, this approach would essentially define the ambit of a constitutional right by whatever a state agency says it is. This approach fails to give due deference to the State Constitution and to courts' final authority to "say what the law is."

Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 484 (N.Y. Sup. Ct. 2001) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803)).

[14] Courts in other states have recognized the importance of judicial role in reviewing the constitutionality of educational standards. *See, e.g., Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475, 484 (N.Y. Sup. Ct. 2001); *Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 850 P.2d 724, 734-35 (Idaho 1993); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 691-92 (Mont. 1989); *Seattle Sch. Dist. No. 1 of King County v. State*, 585 P.2d 71, 95-96 (Wash. 1978); *Leandro v. State*, 488 S.E.2d 249, 259-260 (N.C. 1997); *Alabama Coalition for Equity v. Hunt, Op. of the Justices*, 624 So.2d 107, 144 (Ala. 1993); *cf. Rolph v. State*, 677 N.E.2d 733, 737 (Ohio 1997).

Edgewood IV, 917 S.W.2d at 732. The Court explained that "[t]his is simply another way of saying that the State's provision for a general diffusion of knowledge *must reflect changing times, needs, and public expectations.*" *Id.* at 732 n.14 (emphasis added). Petitioners have the right to proceed with their claim that the state's accreditation requirements have not kept up with changing times, needs and public expectations, and that the Petitioners lacked meaningful discretion to drop below this adjusted "floor."[15]

C. Evidence should be considered in determining whether current accreditation standards satisfy the constitutional general diffusion of knowledge standard.

The *Edgewood IV* court recognized that the issue of whether the constitutional "general diffusion of knowledge" standard is met requires consideration of evidence. In footnote 10, the court referred to what it characterized as an evidentiary finding by the trial court "that meeting accreditation standards, which is the legislatively defined level of efficiency that achieves a general diffusion of knowledge, requires about $3,500 per weighted student." *Edgewood IV*, 917 S.W.2d at 731 n.10. Judge Scott McCown, the trial judge who presided over both this case and *Edgewood IV* (as well as *Edgewood II* and *III*), rejected the notion that footnote 10 precluded consideration of evidence in this case. He stated that the Court's language was "dicta" and explained that the linkage between the general diffusion standard and accreditation standards "wasn't litigated [in *Edgewood IV*]. It wasn't before the trial court. It wasn't on appeal...." (RR 44.) This

[15] The leniency of the accreditation requirements is demonstrated by the fact that only one district was considered academically unacceptable in 2001. *See* TEX. EDUC. AGENCY, 2001 Accountability System Ratings List, *at* http://www.tea.state.tx.us/perfreport/account/2001/ratelist.srch.html. Petitioners have a right to question whether these requirements comport with public needs and expectations.

conclusion is further supported by the fact that, in *Edgewood IV*, the trial court had severed out adequacy issues, including the issue of "whether the legislature appropriates sufficient funds for districts to provide a constitutionally, minimally acceptable education." *Edgewood IV*, 917 S.W.2d at 736 n.20.[16]

In any event, consideration of evidence in 2002, seven years after *Edgewood IV*, is appropriate because, as the Court further noted in footnote 10: "future legal challenges may be brought if a general diffusion of knowledge can no longer be provided within the equalized system because of changed legal or factual circumstances." *Id.* at 731 n.10.

D. The Legislature has never explicitly linked the accreditation standards with its constitutional duty to provide a general diffusion of knowledge.

Finally, despite the court of appeals' determination that the Legislature has conclusively linked the accreditation standards it adopted with its constitutional duty to provide a "general diffusion of knowledge," it has never explicitly done so. Chapter 39 of the Texas Education Code, which implements the legislative accountability regime, never uses the phrase "general diffusion of knowledge."

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[16] Justice Spector also acknowledged in her *Edgewood IV* dissent that "there [was] virtually no evidence on this [adequacy] issue in the record. What little evidence that did come in indicates that Senate Bill 7's accreditation requirements do not even satisfy any previously-articulated concept of a 'minimally acceptable education.'" 917 S.W.2d at 768 (Spector, J., dissenting). Justice Spector noted that "[a]t the trial of the *[Edgewood IV]* case, the Texas Commissioner of Education testified, in regard to Senate Bill 7, that 'our present accreditation criteria at the acceptable level . . . does not match up with what the real world requirements are.'" *Id.*

CONCLUSION AND PRAYER

The court of appeals erroneously affirmed dismissal of this suit without allowing Petitioners an opportunity to re-plead, engage in discovery, or present evidence. Compounding these errors, the court of appeals premised its decision upon the mistaken assumption that the trial court was not entitled to assess, based upon post-*Edgewood IV* evidence, whether the current public school finance system satisfies the Texas Constitution's "general diffusion of knowledge" standard. Petitioners ask this Court to grant their petition for review, reverse the judgment of the court of appeals and remand this case to the trial court for further proceedings. In the alternative, Petitioners ask that the Court remand to the court of appeals the issues not otherwise addressed by that court. Petitioners further ask for all such other relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the *Petition for Review* has been sent to the following counsel of record in accordance with the Texas Rules of Appellate Procedure on this 18th day of June, 2002:

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